No. 5483

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

JOSE GANDARA,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in error.

ERROR FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA.

BRIEF FOR PLAINTIFF-IN-ERROR

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M'MATH CO.

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The plaintiff-in-error, Jose Gandara, was indicted in Tucson, Arizona, charged with conspiracy to begin, set on foot and provide the means for a certain military enterprise against the Republic of Mexico, and was convicted.

ABSTRACT OR STATEMENT OF THE CASE

The questions involved in this appeal are:

1. The refusal of the Court to instruct the jury upon the defendant's theory of defense as requested in writing; that is to say, if they believed from the evidence, or had a reasonable doubt thereof, that a revolution or revolt was in existence in the Republic of Mexico and that the members thereof came to the United States for the purpose of securing munitions of war and provisions and then returning to Mexico, and the defendant, Gandara, furnished ammunition or provisions only for such as had come from Mexico, that then such furnishing of ammunition and provisions would not constitute beginning, setting on foot, providing or preparaing the means for a military enterprise, and that then, and in that event, if the jury so found, they should acquit the defendant on the charge of conspiracy. (Tr. p. 38).

2. The refusal of the Court to instruct the jury to find the defendant not guilty on the ground that there was insufficient evidence to sustain a conviction, said motion being made when the Government rested, and renewed at the close of the case. (Tr. pp. 14, 15, and 210).

ASSIGNMENT OF ERROR NO. ONE

(Tr. pp. 28-29)

Because the Court erred in overruling the defendant's exception to the Court's charge for its failure to charge the jury upon defendant's theory of defense that if a military enterprise or expedition had been begun or set on foot in Mexico, and the acts alleged to have been done by the defendant were done in a conspiracy in connection with such an expedition, then he should be acquitted.

ASSIGNMENT OF ERROR NO. TWO

(Tr. pp. 29-30)

Because the Court erred in refusing to give to the jury defendant's special requested instruction No. 1, submitting defendant's theory of defense to the effect that if the jury believed that a military expedition had been already begun or set on foot in Mexico and the members thereof had come to the United States for ammunition and supplies with the purpose and intention to return to Mexico, and that the defendant conspired to furnish arms and ammunition to such expedition, he would not be guilty of an offense under the charge as laid in the indictment, said requested instruction reading as follows:

"Gentlemen of the Jury:

The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military forces of the Mexican government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians in Mexico, and the defendant Gandara furnished ammunition or provisions only for such Indians as had come from Mexico, and intended to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishing of ammunition and provisions would not constitute either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant, Gandara, would

not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States."

Which special requested instruction was refused by the Court, to which action the defendant then and there excepted, and said requested instruction was marked refused and ordered filed.

ARGUMENT

While the Court instructed the jury generally on the law of conspiracy and on the neutrality statute, the defendant, by the timely presentation of Special Instruction No. 1, called the Court's attention to the Court's failure to charge on the defendant's theory of defense. This was likewise called to the Court's attention by defendant's exception to the Court's charge for its failure to submit the defendant's theory.

The defendant's contention is that he did not violate any law of the United States, nor did he conspire to begin, set on foot or provide or prepare the means for a military enterprise to be carried on from the State of Arizona against the Republic of Mexico. In other words, his contention is (and the evidence clearly shows) that a party of insurgents or revolutionists came to the United States to procure arms and ammunitions to take back with them to continue their revolutionary activities, and that the defendant's acts were exclusively with such enterprise.

In support of the above proposition, we feel it is desir-

able to quote at length the testimony demonstrating that such was the case.

Guadalupe Flores, a witness for the Government, testified (Tr. p. 77) as follows:

> "I have been here a short time. I was one of the Yaqui Indians who came from Mexico in April or May. And I came on the American side. Twenty-two men came with me. They were not picked up by the officers along the line; they didn't pick us up. *We came right to Tucson, twenty-two of us. And we were not apprehended or put in jail at all. We came up here for rifles and ammunition. We had been fighting in Mexico. We had been fighting there a long time. Five years. I, myself, had been fighting for five years. There are some thousands of Yaquis up in the mountains in Sonora. More than about two or three thousand, and the Mexican Government has been taking their lands away in the Yaqui Valley, and that is the reason we were fighting.*"

Likewise, the testimony of Francisco Feliz, a witness for the Government, who testified (Tr. pp. 70-71) as follows:

> "This house of mine is a meeting place for the Yaquis who came out of Sonora along in April or May of this year. As to how many of these Yaquis were there that came up from Sonora. There were several. I didn't count them. I think there were probably fifty all together. I didn't count them. There may have been one hundred. And they would meet quite frequently at my house. They came to my house because they were Yaquis and I let them stay at the house for the reason that they were hard up and I let them stay there and harbored them in my house. *And these men had been engaged in a revolution in Sonora prior to the time they came up there and they were after them. They had been fighting before they came here and they were right after them. They came here for the purpose of getting arms and ammunition to take back and go back and fight. That is true; they didn't come because they wanted to come. Juan Frias told me that he had a company here that was going to furnish him all of that stuff and that is what they came up here for—to get that stuff and go back and fight.* Some of those Yaquis have gone back—a few of them; I have not counted how many

are left here now. They have got scattered around. Nobody ever asked me to go down and fight during this period. *The truth of the matter is that these men come up from Mexico and they had been engaged in a revolution there* and some of them have went back.

"Gandara told the Yaquis who had come from the Yaqui River that he was going to help them. (Tr. p. 69). Gandara said he was going to go along with the other men to Mexico (Tr. p. 70). *I know that the Yaquis had been in a revolution for a long time against the Mexican Government. The Mexican Government had taken their lands from them, and they were trying to get back what was their's, and that is what those men who came to my house had been fighting for down there. They followed them around wherever they hid themselves; they have got to help themselves some way.* (Tr. p. 73). * * * *I have told Mr. Hilzinger, counsel for defendant, that they had not talked to any of the Yaquis down there except the ones who were going back to Mexico. * * * The Yaquis said the Mexican Government had taken the lands away from the Yaquis and they are up in the mountains—they are after them, right after them all the time."* (Tr. pp. 74-75).

And further, Antonio Molino, a witness for the Government, testified (Tr. pp. 60-61) as follows:

"All the world knows that a large force of Yaquis—about one hundred and fifty in number—came over from Mexico along in April or May of this year, and as a matter of fact, I know that those Yaquis came up from Mexico in order to get a supply of ammunition to take back to the other forces of the Yaquis in Sonora, and that this was their purpose in coming here, and they were going back again. Bishop Navarette went to Chico Feliz's house and Chico Feliz was there and a crowd of about thirty-five Yaquis who had come up from Sonora to receive this ammunition. There was about thirty-five Yaquis in my house, and I was harboring these people there myself. I was harboring them because of sympathy and the way they looked. Their clothes were all torn and ragged. * * * At our home in Mexico, we could not live. We could not own our homes. There is no way for us to own our own homes. If we go to work and raise one or two or three cows, then the Government comes in and takes it away from us. If we raise one hundred sacks of grain, it would be all taken away."

José Esteban Riveras, a witness for the Government, testified as follows:

> "I came to the United States the last time on the 10th of May. I remained down in the Yaqui Valley for some time. I remained there the last time about eight months. *We were fighting down there.* Five men came back to the United States with me in May —only one family. *And we were armed at the time that we came across.* (The witness was asked by counsel to look in that bunch of old guns and pick out the guns that they had, if he could, and he replied): "My rifle, I throwed it away because it was too old. I was born down in the Yaqui country. During the course of the last ten years I have been going and coming all the time. *I would go down to the Yaqui Valley and fight a while and then come back to the United States, get some money, provisions, ammunition and rifle, and go back and fight some more.*" (Tr. pp. 120-121). * * *
>
> *"Gandara told us that he wanted to go back with us Yaquis to Mexico. All the men that he could gather around there were going with him and they were all the Yaquis who had come up from Mexico and had been fighting there before."* (Tr. p. 124).

Jesus Riveras, a witness for the Government, testified as follows:

> "I came to the United States in May. *I had been fighting down in the Yaqui country,* and I came up with my father, Jose Esteben Riveras. There were many fighting down there before. *I had been fighting for about a month and we were coming up here to get ammunition to go back there and fight.* I had been fighting with the Mexicans just a little and then I came with my father." (Tr. p. 128).

And the defendant, Jose Gandara, testified as follows:

> "The Yaquis that I came to see were all from Mexico, but I didn't want to talk—that is, I wanted to get in touch with the Yaquis from Mexico, and I came here for the purpose of finding from the Yaquis here how I could get in touch with the Yaquis in Mexico." (Tr. p. 168). * * * *"They came here to Tucson to get all the supplies they could and to go back."* * * * *"They came from the Yaqui River. They were armed; they were part of the band that fought General Armenta. Their object in coming out of Mexico from*

the battle to Tucson was to get arms and munitions, mostly ammunition. As to arms, they had them, for there has been possibly forty or fifty million rifles imported into Mexico since 1910, according to general information." (Tr. pp. 169-170). * * * "As to what was my object in seeing these Yaquis who had come up from the rebellion in Mexico, I wanted to go back to the Yaqui River with them, to talk to the chiefs down there, and my purpose in coming to Tucson was to get the older men of the tribe, which is their authority, to give me some sort of recommendation or document that would introduce me to the chiefs of the Yaquis in Mexico. * * * I expected to go with those Yaquis on foot; that is the only way they travel." (Tr. p. 172). * * * "Subsequent to my interviews with these Yaquis, I obtained ammunition. That was approximately about—around the middle of June, or perhaps a little before. I brought ten thousand rounds, or about eight or ten thousand rounds from El Paso of seven millimeter ammunition. As to why I got seven millimeter ammunition that is the arms that the Yaquis have." (Tr. p. 172).

AUTHORITIES

Calderon vs. U. S. 279 Fed. 556.
Bird vs. U. S. 180 U. S. 356.
Hendrey vs. U. S. 233 Fed. 5.

There were two reasons why the requested charge on defendant's theory should have been given, viz:

FIRST: The charge, as prepared, submitted the issue to the jury along the lines of and in conformity with the law as laid down in U. S. vs. Trumbull, 48 Fed. 99. In that case, Judge Ross, in referring to the statute in question, said:

"The very terms of that statute imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States and are to be carried on from this country. "Every person who, within the limits or jurisdiction of the United States, begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence,—that is to say, from the United States,—is the language of the statute. If the evidence shows that in this case

there ever was any military expedition begun or set on foot or provided or prepared for within the sense of this statute, it was begun, set on foot, provided and prepared for in Chile and was to be carried on from Chile and not from the United States. But I think it perfectly clear that the sending of a ship from Chile to the United States to take on board arms and ammunition purchased in this country and carry them back to Chile, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise within the meaning of Section 5286 of the Revised Statutes."

While the Statute has been amended since the date of the above decision in the Trumbull case (1891), there is nothing in the amendment which makes the Trumbull case inapplicable to the case at bar.

The soundness of the reasoning in the Trumbull case is the better exemplified if applied to the case at bar by considering the question as to whether or not the members of the party of Yaqui Indians who came from Mexico were guilty of a conspiracy to begin, set on foot, provide or prepare the means for a military enterprise to go thence to Mexico. If they were not, the one who aided them or acted with them in their activities to procure arms and ammunition would not be guilty of an offense. The entire testimony of the case, as shown by the record, was to the effect that a military expedition or revolt or rebellion had been begun or set on foot in the Republic of Mexico and was to be carried on from Mexico and not from the United States.

The opinion of Judge Ross in the Trumbull case has never been overruled and we respectfully submit that the facts of the case at bar fall within the exact terms of the construction of the Neutrality Statute therein.

If this learned Court concludes that Judge Ross was

wrong in his statement of the law, or that the facts in this case do not come within the purview of the decision, then we submit:

SECOND: A careful perusal of the indictment will reveal that it limited the charge to a conspiracy to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion in Mexico against the Government and authority there, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion. This indictment either charges no offense, or, if it charges an offense, then the defendant's theory of defense which was embodied in the requested charge, which was refused, was not submitted as an issue. We venture to suggest that it is not against the neutrality laws to set on foot and provide and prepare the means for an enterprise having for its object the inciting of armed rebellion in another country, nor is the mere furnishing of arms, munitions, supplies and money for carrying on and supporting a rebellion violative of the statute in question. This we believe is the very essence of the case at bar. The mere calling of the offense a conspiracy to set on foot, provide, etc., a military expedition to go thence is insufficient when the pleader, by well defined limitations in stating the objects of the conspiracy, sets out lawful acts, to-wit, having for its object the inciting of armed rebellion.

While we concede that where the sufficiency of an information or indictment is not questioned by demurrer or appropriate remedy, any defect of form though not of substance is cured by a verdict of guilty, yet we believe that the defect above affects the substantial rights of the de-

fendant, and to this extent the matter may be considered by the Appellate Court.

The indictment in this case follows the language of the Statute but as it proceeds to describe, with attempted precision and certainty, the offense intended to be laid, it finally charges the defendant, as hereinabove stated, with a conspiracy to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion, but not to go thence from the United States. This indictment could not be considered as describing the offense with particularity and exactness so as to give protection to the defendant and not force him to resort to and rely on the uncertainties of extraneous proof, nor would the indictment operate as a protection against double jeopardy. (See Jarl vs. U. S. 19 Fed. (2nd) 891).

In Ledbetter vs. United States, 170 U. S. 606, the Court said:

> "We have no disposition to qualify what has already been frequently decided by this Court, that where the crime is a statutory one, it must be charged with precision and certainty and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors, the indictment must be *free from all ambiguity* and leave no doubt in the minds of the accused and the Court of the exact offense intended to be charged."

It will be noted further that the indictment contains on its face, to an aggravated degree, the fault of repugnancy, in this: that there is a contradiction between material allegations therein. That is, the indictment, intending, perhaps, to charge conspiracy to set on foot a military expedition to go thence, yet really charges a conspiracy to incite a revolt in Mexico. (See Sunderland vs. U. S. 19

Fed. (2nd) 202).

In United States vs. Howard, Federal Cases No. 15403, Mr. Justice Storey said:

> "No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential in the charge in the indictment, can ever be rejected as surplusage."

In the United States vs. Eisenminger, 16 Fed. (2nd) at page 820, the Court said:

> "The object of an alleged conspiracy is that which identifies and describes the particular unlawful agreement or conspiracy with which the defendant stands charged. No part of that description may be ignored as surplusage. It must be proved as laid." Quoting Rabens vs. U. S. 146 Fed. 978.

In the Eisenminger case, supra, the Court said:

> "If a legal act may be pleaded as part of the object of a conspiracy and the object of that conspiracy be affected by the committing of that legal act by anyone of the persons alleged to be parties to the conspiracy, then, indeed, has a prosecution for conspiracy become a most potent instrumentality for the conviction of the innocent. I think that the rules of pleading in conspiracy cases should not be further relaxed to the prejudice of those accused regardless of their guilt."

The evidence, taken as a whole, indicates, at its worst, that the defendant was endeavoring to ally himself with the cause of the Yaqui Indians, and to this end, was furnishing them ammunition as an inducement to take him along with them to Mexico. That he conspired with anyone is not in evidence. That there was ever a meeting of minds for the commission of an unlawful act was not shown. . . . . .

In Butler vs. U. S., 20 Fed. 570, the Court said:

> "The rule is that where words are employed in an indictment which are descriptive of the identity of that which is legally essential to the charge in the

indictment, such words cannot be stricken out as surplusage."

The indictment herein intended to charge a conspiracy to knowingly, willfully, unlawfully and feloniously, begin, set on foot and provide for a military enterprise to be carried on from the State of Arizona against Mexico; "that is to say, the said defendants did *(unlawfully?)* conspire to *(knowingly?)* set on foot and provide the means for an *(military?)* enterprise, having for its objects the inciting of armed rebellion in the Republic of Mexico, and the furnishing of arms, munitions, supplies and money for carrying on such rebellion, and an enterprise to be *carried on* from Tucson."

The Neutrality Statute cannot be violated by setting on foot or providing the means for an enterprise such as described in the indictment. Therefore, a conspiracy to do the things named would not be unlawful, and the defendant was entitled to a peremptory instruction to find him not guilty. The last above quoted language of the indictment negatives the main requirement of the law—that is, that it was to be attended by the design of an attack, invasion or conquest; there must be a hostile intention and it must be military, and intended "to go thence." (See U. S. vs. Ybañez, 53 Fed. 536).

To make our position clearer, may we state to the Court that the furnishing of money for carrying on and supporting a rebellion in a foreign country is not a violation of the Neutrality Statute even though such furnishing of money was to be carried on from Tucson, Arizona, and the furnishing of arms for such enterprise would not be a violation of the Statute in question even though the furnishing of arms was to be carried on from Tucson, Arizona.

Of course, the latter act would be in violation of the Presidential Proclamation placing an embargo on arms, etc., to Mexico, but the indictment did not charge this offense.

We respectfully submit that the Trial Court erred in the particulars herein set out and ask a reversal of the case.

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